Southern California Edison Company *and* Utility Workers Union of America Local 246, AFL–CIO

Southern California Edison Company *and* International Brotherhood of Electrical Workers, Local 47, AFL–CIO–CFL

Southern California Edison Company *and* Utility Workers Union of America, Local 246, AFL–CIO; International Brotherhood of Electrical Workers, Local 47, AFL–CIO–CFL. Cases 21–CA–22850, 21–CA–27573, 21–CA–23587–1, 21–CA–23668, 21–CA–26450, 21–CA–26962, 21–CA–28584, and 21–CA–26885

April 30, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 21, 1991, the Acting Regional Director for Region 21 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing against Southern California Edison Company, the Respondent. The complaint alleged that the Respondent has unilaterally implemented various drug and alcohol testing programs and search practices, thereby modifying the terms and the conditions of employment of the collective-bargaining agreement in violation of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Thereafter, on March 10 and May 15, 1992,[1] the Regional Director for Region 21 issued an amendment to consolidated complaint and a second order consolidating cases, second amended consolidated complaint and notice of hearing, respectively. Subsequently, the Respondent filed answers, admitting in part and denying in part the allegations of the various complaints and submitting affirmative defenses.[2]

Thereafter, on June 5, the Respondent filed a Motion for Summary Judgment, or in the alternative, to sever proceedings and a brief in support that renewed its contention that the Board should defer to the arbitrator's decision and dismiss all of the charges or, in the alternative, sever those charges which were not the subject of the arbitrator's decision and dismiss them or defer them pursuant to the Board's *Collyer* doctrine.[3]

On June 22, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 6, the Charging Parties, Utility Workers Union of America, Local 246 and International Brotherhood of Electrical Workers, Local 47, filed briefs in opposition and on July 8 the General Counsel likewise filed a brief in opposition to the motion. They argue, among other things, that the Board should not defer to the arbitrator's decision on the ground that it is repugnant to the purposes and policies of the Act. On August 20, the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

The facts are relatively complex, concerning 14 discrete charges and amended charges, spanning an 8-year period, and implicating a variety of drug and alcohol policies and procedures which the Respondent has allegedly implemented during that time period. In light of our disposition of the issues, we will not detail each of the complaint allegations. Because the unfair labor practice allegations allegedly derive from the Respondent's initial implementation of its drug and alcohol policy and procedures at its San Onofre Nuclear Generating Station (SONGS) in 1984, the Respondent argues that the arbitration decision rendered by Arbitrator Thomas T. Roberts in Grievance No. 10–86–141, which upholds the Respondent's unilateral implementation of the SONGS drug screen program, should control the resolution of all the charges and amended charges and qualifies for deferral under *Spielberg Mfg. Co.*, supra.

Grievance No. 10–86–141, which challenged the Respondent's SONGS drug screen program, was filed on April 23, 1986. Arbitrator Roberts was presented with the following question: ''Does the Company's implementation and/or application of the San Onofre Red Badge Drug Test Program violate the collective bargaining agreement?''

[1] All dates are in 1992, unless otherwise stated.

[2] As an affirmative defense, the Respondent contends, among other things, that all the claims, allegations, and disputes underlying the charges and amended charges composing the second amended consolidated complaint have been resolved by the arbitration award in Grievance No. 10–86–141, thereby requiring dismissal in accordance with *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). The Respondent also contends that the charges underlying in the second amended consolidated complaint, with the exception of the third amended charge in Case 21–CA–22850 and the charge in Case 21–CA–28584, had been administratively deferred for arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), but that deferral was withdrawn when the General Counsel instituted these proceedings. The Respondent contends that the Board should continue to defer to the parties' grievance-arbitration mechanism and dismiss the complaint.

[3] The Respondent asserts that the Regional Director withdrew its previous *Collyer* letters and commenced this consolidated proceeding despite the Respondent's request that the charges (other than the one specifically referenced in Arbitrator Roberts' decision) should continue to be deferred until an arbitration award issues that addresses the precise issue underlying each discrete charge.

The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

Complaint paragraph 9(b) tracks the language of this grievance and alleges that:

> On the dates noted herein below, at the SONGS facility, Respondent, without prior notification to or bargaining with Local 246, changed terms and conditions of employment of the employees in the Local 246 unit described in paragraph 5(a) above, by the noted conduct: On or about August 7, 1984, instituted modifications to the Alcohol and Drug Abuse policy which provided, inter alia, that employees would be subjected to blood and urine tests to ensure their compliance with the Alcohol and Drug Abuse policy.

The Respondent argued before the arbitrator that the drug screening program is grounded in safety because drug use by a SONGS employee working in a potentially lethal environment creates an unacceptable hazard. The Respondent insisted that, under its collective-bargaining agreement with Local 246, management has broad authority to implement a variety of work and safety related rules and to enforce them through disciplinary action. The Respondent particularly relied on section N of article X of the collective-bargaining agreement, which provides that:

> (1) The Company shall make reasonable provisions for the safety of employees in the performance of their work. The Union shall cooperate in promoting the realization of the responsibility of the individual with regard to the prevention of accidents.
>
> (2) The Company reserves the right to draft reasonable safety rules for employees and to insist on the observance of such rules. The Union may submit suggestions to the Company's Labor Relations Division concerning plant safety conditions and revision and enforcement of safety rules.

Local 246 asserted that the Respondent violated its contractual obligations by unilaterally imposing mandatory drug testing. Local 246 added that this unilateral conduct was a violation of the National Labor Relations Act as well.

The arbitrator specifically found that the challenged drug tests were directly related to safety considerations and, because the collective-bargaining agreement reserves to the Company the right to establish and enforce reasonable safety rules, ''the duties and obligations of management in that regard have been bargained so that no basis remains to implicate Section 8(a)(5) of the NLRA.'' He also found that the terms of the collective-bargaining agreement afforded management the discretion to implement the SONGS Red Badge drug test policy. He found that paragraph (2) of section N of article X

> reserves to management the right to draft (i.e., establish) safety rules and to insist upon the observance of those rules. While the Union may submit suggestions concerning plant safety conditions in addition to proposals directed to the revision or enforcement of safety rules, the prerogative to promulgate and implement such rules lies exclusively with management.

In the arbitrator's view, the Respondent's prerogative to promulgate and implement safety rules was only limited by the contractual language requiring that the safety rules be ''reasonable.'' After considering several factors, including the nature of the testing; the manner in which the testing affects individual employees; the Nuclear Regulatory Commission requirements that licensees develop and implement procedures for the security of their facilities; and the weight of arbitral authority on the issue, the arbitrator concluded that the Respondent's SONGS drug test policy was a reasonable safety rule permitted by the contract. Accordingly, the arbitrator denied the grievance.

The Board requires that several criteria be met before post-arbitral deferral is exercised. The parties agree, however, that the only criterion at issue here is whether the arbitrator's decision is ''clearly repugnant to the purpose and policies of the Act.'' *Olin Corp.*, 268 NLRB at 573–574. The ''clearly repugnant'' test requires that the party urging nondeferral, here, the General Counsel, must show that the decision to which deferral is sought is ''palpably wrong,'' i.e., ''not susceptible to an interpretation consistent with the Act.'' Id.

The General Counsel and the Charging Parties assert that the arbitral award is repugnant because the arbitrator failed to use the Board's statutory standard which would require a showing that the safety provision set forth in article X, section N of the contract clearly and unmistakably waived the right to bargain about drug testing. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman Co.*, 295 NLRB 180 (1989); *Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991). They note that Arbitrator Roberts effectively concluded that, by having agreed to the safety provision, the Union waived its right to bargain concerning the implementation and/or application of the drug test program. According to the General Counsel and Charging Parties, however, this ''waiver'' was not clear and unmistakable because the safety clause is couched in general terms, it does not make specific reference to drug or alcohol regulations or testing, and the arbitrator cited no evidence that drug testing was discussed during negotiations.

The General Counsel and the Charging Parties do not raise any material issues of fact regarding the appropriateness of deferral. Rather, the nature of their contention is that deferral is inappropriate as a matter of law.

We disagree with the General Counsel's and the Charging Parties' view of the ''clearly repugnant'' standard as it is applied to the arbitrator's decision regarding the contractual authorization for the Respondent's implementation of the SONGS drug testing program. Contrary to the contentions of the General Counsel and the Charging Parties, the Board has deferred to arbitration decisions which find that language in a general management-rights clause authorizes unilateral changes in terms and conditions of employment by an employer. See, e.g., *Hoover Co*., 307 NLRB 524 (1992) (arbitrator found that clause giving employer the right to ''establish and from time to time amend rules and regulations'' authorized unilateral ban on smoking under the circumstances); *Dennison National Co*., 296 NLRB 169 (1989) (arbitrator found that the management-rights clause authorized unilateral elimination of job classifications). Indeed, the Board has specifically stated that, ''if an arbitrator upholds an employer's argument that its actions were justified by a contractual management-rights clause, the Board, in an 8(a)(5) unilateral change case, would defer to the award, even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver. *Motor Convoy*, 303 NLRB 135, 136 (1991). Thus, an award can be susceptible to the interpretation that the arbitrator found a waiver, even if the arbitral award does not speak in those terms. Further, given such a finding of waiver, the mere fact that the Board would not have found a waiver is insufficient by itself to establish repugnance.[4] The Board will determine whether a particular award is ''clearly repugnant to the Act'' by reviewing all the circumstances, including the contractual language, evidence of bargaining history and past practice presented in the case.

Applying these principles to the facts of this case, we find that the arbitrator's decision is susceptible to an interpretation consistent with the Act. First, the arbitrator reasonably found that the contractual language at issue is specifically worded to reserve to management the right to implement reasonable safety rules. This determination was based, in part, on the text of the clause, which states that the Respondent may draft and enforce ''reasonable safety rules,'' and that Local 246 may submit suggestions regarding such rules.

After reviewing the working conditions at the Respondent's nuclear plant, the parties' past practice with respect to work and safety rules, and the bargaining history of the particular clause at issue in the proceeding, the arbitrator found that the SONGS drug test program was a safety rule within the meaning of the parties' agreement. Likewise, based on his review of industry practice, the responsibilities of the employees covered by the rule, the procedures and safeguards established by the Respondent, and arbitral and legal precedent, the arbitrator found that the testing program was ''reasonable'' as well.

In view of these amply supported findings, we find no basis for concluding that the award is ''palpably wrong.'' Accordingly, we will defer to the arbitration award in Grievance No. 10–86–141. However, the terms of that arbitration award directly implicate only one paragraph in the complaint—paragraph 9(b). We will, therefore, grant the motion to dismiss under *Spielberg* only insofar as paragraph 9(b) is concerned. We now turn to the other allegations of the complaint. As noted supra, some of them were originally deferred by the General Counsel under *Collyer*, and such deferral was subsequently revoked; some of these allegations were never deferred by the General Counsel under *Collyer*. As to both categories, we conclude, contrary to the General Counsel, that *Collyer* deferral is appropriate. In this regard, we note that the allegations raise issues of contract interpretation, the broad arbitration clauses in the applicable bargaining agreements clearly encompass the matters in dispute, the Respondent has asserted its willingness to arbitrate the disputes, there is no claim of employer animosity to the employees' exercise of protected rights, and the parties have a stable bargaining relationship. See, e.g., *August A. Busch & Co*., 309 NLRB 714 (1992).[5] Accordingly, as to these allegations, we shall dismiss the complaint, subject to the retention of limited jurisdiction.[6]

[4] Compare *Johnson-Bateman*, above. In *Johnson-Bateman*, the Board found neither the management-rights clause in the parties' agreement nor the parties' bargaining history demonstrated that the union had clearly and unmistakably waived its right to bargain over the implementation of a drug testing program. However, the Board also noted that no party sought deferral of the charge to arbitration. Thus, the Board did not purport to decide whether either pre- or post- arbitral deferral would be appropriate under the circumstances presented there.

[5] Contrary to the General Counsel and the Charging Parties, the Board has found that prearbitral deferral of unfair labor practice charges challenging unilateral changes in terms and conditions of employment is appropriate even where no specific contractual provision's meaning is in dispute. *Inland Container Co*., 298 NLRB 715 (1990) (8(a)(5) charge concerning unilateral implementation of drug testing deferred to arbitration under *Collyer*).

[6] Because the only arbitral award presented to us does not address the events underlying these additional allegations, we deny the Respondent's Motion for Summary Judgment to the extent that it seeks dismissal under *Spielberg* with respect to those allegations. In this regard, we note that the Respondent avers that certain arbitration awards have issued with respect to some of the other controlled substance rules at issue in this case. Inasmuch as copies of the alleged awards have not been placed into evidence nor have we been presented with any other evidence concerning their contents, we find no basis for deferring to those awards under *Spielberg* at this time. Although the Respondent has requested in its reply brief that it be permitted to move for dismissal of the complaint allegations related to these alleged awards if the Board does not defer to the Roberts award, in light of our disposition of this case it would serve no purpose to allow the Respondent to file additional motions concerning these awards with the Board at this time.

In sum, we grant the Motion for Summary Judgment as to paragraph 9(b) of the complaint and dismiss that allegation. As to the other allegations, we grant the Motion for Summary Judgment and dismiss such allegations, provided that:

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on the proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.